Filed 3/30/09 In re A.D. CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| In re A.D., a Person Coming Under the Juvenile Court Law. | B209346<br><br>(Los Angeles County Super. Ct. No. CK65236) |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>D.B.,<br><br>Defendant and Appellant. | |

APPEAL from an order of the Superior Court of Los Angeles County, Jan G. Levine, Judge. Affirmed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Frank J. DaVanzo, Principal Deputy County Counsel, for Plaintiff and Respondent.

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Mother D.B. appeals from an order terminating parental rights as to her son, A.D. She argues that she was denied due process, because her son's out-of-state placement during the family reunification period prevented her from establishing the beneficial relationship exception to termination of parental rights, as codified in Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i).[1] We find no error and affirm the court's order.

## FACTUAL AND PROCEDURAL SUMMARY

Appellant D.B. is the mother of A.D., who was born in September 2004. A.D. came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) on October 1, 2006, when mother and her boyfriend (father)[2] were arrested for driving a stolen car. Two-year-old A.D. was discovered in the allegedly stolen car without proper restraints. When DCFS interviewed the parents, each denied personal use of illegal drugs, but accused the other of abusing crack cocaine. Mother also accused father of domestic violence.

At the detention hearing, the juvenile court ordered A.D. detained and placed in foster care. DCFS was ordered to investigate maternal grandmother in Illinois as a potential placement.[3] In a subsequent hearing, DCFS was ordered to investigate the paternal grandmother in New Jersey as another potential placement.

At the adjudication hearing held in December 2006, mother appeared and reported that father was in Illinois. The court sustained the amended allegations under section 300, subdivision (b), finding that the parents had engaged in loud and physical

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Mother's boyfriend was subsequently determined to be A.D.'s presumed father. Because he shares the same initials as the minor (A.D.), we refer to him as father. Father is not a party to this appeal.

[3] Though mother wished A.D. to be placed with maternal grandmother in Illinois, DCFS recommended against the placement after conducting its investigation.

altercations, which endangered A.D.'s physical and emotional health and safety; that father was an abuser of cocaine, which intermittently interfered with his ability to provide care and supervision to A.D., endangered A.D., and created a detrimental home environment; and that mother knew of father's drug use and failed to protect A.D. from it. Family reunification services were ordered. Mother was granted monitored visitation and ordered to enroll in parenting classes, individual counseling, and domestic violence counseling. She also was to submit to eight random weekly drug tests. If she missed any of the tests or tested positive, she was to participate in a drug rehabilitation program with random testing. A.D. was to remain placed in foster care.

In April 2007, DCFS filed an ex parte application to place A.D. in New Jersey with his paternal grandmother. Paternal grandmother had been in contact with DCFS since shortly after A.D.'s detention and was "very active" in trying to get custody of the child. The investigation of her home was completed and approved, pursuant to the Interstate Compact on the Placement of Children (ICPC). (Fam. Code, § 7900 et seq.) DCFS informed the court that mother's visitation with A.D. had been "sporadic" and that in the two previous months she had spent approximately two hours with him. Neither parent appeared at the hearing. The court ordered A.D. be placed in New Jersey with paternal grandmother, over the objections of counsel for both parents. The court explained that it was doing so "[i]n view of the fact that mother is not participating in any court-ordered programs and hasn't visited [A.D.] since detention, and mother is not in any of her family reunification programs."[4]

In May 2007, mother gave birth to a girl, A.B. Both mother and daughter tested positive for drugs. DCFS detained A.B., but she is not a subject of this appeal.

In a status review report prepared in June 2007, DCFS reported that a schedule for telephone calls between mother and A.D. had been agreed to by mother and paternal

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[4] It appears the court likely intended to refer to father as not having visited A.D. since his detention. According to the information presented to the court by DCFS, mother had stopped attending her court ordered programs and visited A.D. sporadically. Father had not visited A.D. since he was detained and also was not participating in any court ordered programs.

grandmother. Paternal grandmother stated that she would not accept collect calls, because of the expense. Mother reportedly indicated she would look into getting a calling card.

In a status review report prepared in August 2007, DCFS reported that mother was not in compliance with court orders and had tried to call A.D. only once. Because she called collect, paternal grandmother had not accepted the call. DCFS recommended termination of family reunification services. Mother did not appear at the hearing on termination of services; father appeared in custody. Mother's whereabouts were unknown to her counsel and to father, though father suggested she might be in Illinois. The court found, "[T]here's not a substantial probability that [A.D.] will be returned to either parent by the 12-month date. Neither parent has consistently and regularly visited. Neither have shown significant progress in their programs or the capability of completing the objectives of the treatment plan." Family reunification services were terminated for both parents. Father stated that he still wanted A.D. placed with mother, but he felt paternal grandmother was "doing a good job." (Father later retracted this assessment of paternal grandmother and objected to A.D.'s placement in her care.)

The section 366.26 hearing for A.D. was held on July 15, 2008. The adoption home study for paternal grandmother had been completed and approved, and DCFS recommended termination of parental rights. A.D.'s counsel joined in the recommendation of DCFS. Mother's counsel argued that the beneficial relationship exception to termination of parental rights should be judged "within the context of the placement." Counsel then attempted to argue that family reunification services had not been reasonable, given A.D.'s cross-country placement, but the court sustained an objection to the argument as irrelevant at the section 366.26 stage of the proceedings.

The court found by clear and convincing evidence that A.D. is adoptable and that it would be detrimental to him to return him to his parents. The court also found the beneficial relationship exception did not apply, explaining, "During the course of this case, [mother]'s been whereabouts unknown, she's been in jail, she hasn't—wasn't able to maintain contact with her son, and she doesn't come close to meeting the test that is set

forth in the statute." Mother's and father's parental rights as to A.D. were terminated. A.D.'s custody was transferred to DCFS for adoptive planning and placement. Mother filed this timely appeal.

## DISCUSSION

Mother contends her son's out-of-state placement during the family reunification period amounted to a denial of due process, because it prevented her from establishing the regular visitation component of the beneficial relationship exception to termination of parental rights.[5]

"In dependency proceedings, there are generally four phases: (1) detention and jurisdiction; (2) disposition; (3) the provision of services for reunification or family maintenance, accompanied by periodic review hearings; and (4) either a permanent plan for the child's placement outside of the parent's home or termination of the dependency." (*In re Paul W.* (2007) 151 Cal.App.4th 37, 44.) The order placing A.D. with paternal grandmother was made during the third phase, while reunification services were being provided to the family.

During the reunification period, family preservation is the primary focus of the dependency scheme, and "'the parent's interest in reunification is given precedence over the child's need for stability and permanency.'" (*David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 778.) "Visitation is an essential component of any reunification plan." (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 972.) Thus, depending on the circumstances, a reviewing court may conclude that the state has not offered reasonable reunification services upon finding that parents were not offered adequate opportunities for visitation during the reunification period. (See, e.g., *id.* at pp. 972-973; *In re Luke L.* (1996) 44 Cal.App.4th 670, 679-680.) This issue may be raised on appeal from an order

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[5] The beneficial relationship exception to termination of parental rights requires a parent to demonstrate that "[the parent has] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

made during the reunification period or in a petition for extraordinary relief following an order terminating reunification services and setting a 366.26 hearing. (§§ 366.26, subd. (*l*); 395, subd. (a)(1).)

The juvenile court's priorities shift at the section 366.26 hearing. By the time the dependency proceedings have reached the permanency planning stage, "the parent's interest in reunification is no longer an issue and the child's interest in a stable and permanent placement is paramount. [Citations.] 'In light of the earlier judicial determinations that reunification cannot be effectuated, it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home.'" (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.)

Mother did not appeal from the May 2007 order placing A.D. with paternal grandmother. Nor did she petition this court for extraordinary writ review of the order setting the 366.26 hearing. Instead, she waited to seek appellate review until after the focus of the proceedings shifted from reunification to permanency planning for the child. On appeal from an order terminating parental rights under section 366.26, mother may not object to prior orders from which she did not appeal. (See *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1149-1150.) This rule "flows from section 395, under which the dispositional order is an appealable judgment, and all subsequent orders are directly appealable without limitation except for post-1994 orders setting a .26 hearing, which are subject to writ review . . . . A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order. [Citations.] In other words, 'A challenge to the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed.' [Citation.] The rule serves vital policy considerations of promoting finality and reasonable expedition, in a carefully balanced legislative scheme, and preventing late-stage 'sabotage of the process' through a parent's attacks on earlier orders." (*In re Jesse W.* (2001) 93 Cal.App.4th 349, 355.)

When applied in the context of an appeal from an order terminating parental rights, the rule disallowing attacks on prior orders serves to further the legislative goal of

"providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful." (See *In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) Accordingly, mother is now precluded from challenging the placement of A.D. during the reunification period. That mother's appeal alleges a violation of an important constitutional right does not require a different result. (See *In re Meranda P.*, *supra*, 56 Cal.App.4th at p. 1151 [enforcement of "'waiver rule'" against mother who claims that her constitutional rights were infringed in earlier proceedings does not offend due process].)

In any event, even if mother was not precluded from challenging A.D.'s placement with his paternal grandmother in New Jersey, she has not demonstrated that the placement violated her substantive due process rights. "Substantive due process prohibits governmental interference with a person's fundamental right to life, liberty or property." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 306.) A deprivation of a fundamental right "is permitted only if the government action has a reasonable and substantial relation to the objective sought." (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.) Mother undisputedly has a fundamental liberty interest in the "care, custody, and management" of her child. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 753.) But dependency proceedings implicate the fundamental rights of children, as well as their parents. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 307.) Our Supreme Court has found that the state's interest in protecting the welfare of children is compelling and "requires the court to concentrate its efforts, once reunification services have been terminated, on the child's placement and well-being, rather than on a parent's challenge to a custody order." (*Ibid*.)

Here, the juvenile court ordered services for mother, including visitation, at the detention hearing held on October 4, 2006. The order placing A.D. with his paternal grandmother was not made until May 3, 2007. Thus, mother had the opportunity to avail herself of visitation with A.D. for seven months before he was placed out of state. Instead, during that period, mother visited A.D. only sporadically and failed to take steps toward reunification, such as consistently participating in court-ordered counseling and drug testing. Given mother's poor record of compliance, the court's decision to place

A.D. with paternal grandmother, a relative who had been "very active" in her efforts to provide a stable home for A.D., had a substantial relationship to the state's compelling interest in promoting the well-being of the child.

Finally, mother contends that once A.D. was placed in New Jersey, DCFS had an obligation to ensure that she was able to take advantage of the telephonic visitation schedule. Since paternal grandmother would not accept collect calls, mother asserts that DCFS should have provided a calling card for her to use. Because this argument goes to the reasonableness of the services provided, it should have been raised before the permanency planning hearing, as discussed above. But even if timely, the argument fails. Mother does not point to any place in the record demonstrating she made such a request of DCFS. The closest she comes is a citation to a statement in a DCFS report which purportedly shows that a DCFS social worker was supposed to "check into" getting mother a calling card. DCFS responds that the statement cited by mother refers to mother's intention to check into getting a calling card. The record appears to support DCFS's interpretation. The statement, which appears in a June 2007 status review report, says, "CSW informed [paternal grandmother] that *per* [*mother*] she would check into getting a calling card." (Italics added.) Additionally, an August 2007 status review report says, "CSW recommended to [mother] to purchase a calling card and she agreed." Mother has provided no legal citation for the proposition that DCFS had an obligation, or even the authority, to fund a calling card for her to use in order to call A.D. On this record, we do not find that the absence of a DCFS-funded calling card amounts to a due process violation.

## DISPOSITION

The order terminating parental rights is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.